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No. 99-253

IN THE
Supreme Court of the United States

MARATHON OIL COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF OF PETITIONER

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In its petition for a writ of certiorari, Marathon Oil Company demonstrated that the Federal Circuit's decision in this case is in direct conflict with well-established principles of contract law and this Court's repeated holdings that government contracts are governed by "the law applicable to contracts between private individuals," *Lynch* v. *United States*, 292 U.S. 571, 579 (1934). Rather than addressing the important issues of government contract law squarely presented by the decision below, respondent argues that "[t]he broad legal propositions that petitioners purport to frame for review by this Court are not presented in this case," Opp. 10, and mischaracterizes the court of appeals' decision as a "fact-bound application of the settled precedents of this Court (and of contract law generally)," *id.* at 15. In order to do so, however, respondent not only misrepresents the

facts of this case, but also misstates, or simply ignores, both the settled rules of contract law and the precedents of this Court. As the petition and Judge Newman's dissenting opinion plainly show, the Federal Circuit's decision in this case, in direct conflict with this Court's precedents, did in fact create a rule of law excepting the United States from normal contract principles regarding rescission and restitution, and accordingly warrants review by this Court.

1. Respondent's principal argument is that the court of appeals correctly reversed the Court of Federal Claims' award of restitution against the government because the Outer Banks Protection Act ("OBPA"), Pub. L. No. 101-380, § 6003, 104 Stat. 484, 555-58 (1990) "'essentially had no effect'" on petitioner's leases. Opp. 11 (quoting Pet. App. 14a). Invoking a heretofore unknown "harmless error" exception to ordinary principles of restitution, respondent argues that, even though the OBPA made it impossible for the government to perform its obligations under petitioner's lease contracts, petitioner is not entitled to rescission of its leases and restitution of the money it paid because the "real reason" the government did not perform was that petitioner had "failed to comply with the certification requirements of the [Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1456]," *id.* at 10, with respect to the one Plan of Exploration (POE) it submitted for the Manteo Unit. This argument is factually incorrect. More important, as Judge Newman noted in her dissent, see Pet. App. 22a-23a, it is flatly inconsistent with the ordinary principles of contract law which this Court has repeatedly held apply to government contracts. See, *e.g.*, *United States* v. *Winstar Corp.*, 518 U.S. 839, 895 & n.39 (1996) (plurality opinion); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 369 (1943).

a. Contrary to respondent's claims, North Carolina's CZMA objection to the Manteo Unit's POE was not—and could not have been—the reason for the Secretary of the Interior's failure to perform his contractual duty to "timely and fairly consider" the Manteo Unit's POE, Pet. App. 76a, and to approve it if it complied with the OCSLA, which it did. Petitioner and its partners submitted a POE for the Manteo Unit, which included just four of petitioner's five North Carolina OCS tracts, on August 20, 1990. A month later, on September 28, 1990, the Department of the Interior ("DOI") reported that, even though the POE was "approvable in all respects," *id.* at 194a, the Secretary was nonetheless withholding approval *in order to comply with the OBPA*:

> The [Manteo Unit] Plan, together with its supporting information, is deemed to be approvable in all respects. *The Outer Banks Protection Act (OBPA) of 1990, however, prohibits the approval of any Exploration Plan at this time.* Under Section 11(c) of the Outer Continental Shelf Lands Act [("OCSLA"), 43 U.S.C. § 1337(c)], we are required to approve an Exploration Plan unless it is inconsistent with applicable law or because it would result in serious harm to the environment. Because we have found that [the Manteo Unit's] Plan fully complies with the law and will have only negligible effect on the environment, we are not authorized to disapprove the Plan or require its modification as you suggest.

Id. (emphasis added). By its own admission, the reason for the government's refusal to perform its obligations under petitioner's lease contracts and the OCSLA was the need to comply with the OBPA, *not* North Carolina's CZMA objection. Respondent's *post hoc* attempt to argue that the "real reason" for the government's OBPA-compelled breach of petitioner's lease contracts was *not* the one that it gave when it acted must be rejected. Cf. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) (courts

"must judge the propriety of [the agency's] action solely by the grounds invoked by the agency").

Indeed, it would have been *impossible* for North Carolina's CZMA objection to have been the cause of the Secretary's refusal to approve the Manteo Unit's POE in September 1990—*i.e.*, within the 30-day period in which the Secretary is required to approve a POE that meets the requirements of the OCSLA, 43 U.S.C. § 1340(c)(1). North Carolina did not file its CZMA objection to the Manteo Unit's POE until November 19, 1990—nearly *two months* after the date that DOI would, by its own admission, have been required to approve the POE, but for the OBPA.

Finally, although respondent attempts to blur the different requirements imposed by the OCSLA at each stage of exploration and development of an OCS lease tract, a lessee's failure to obtain a State's CZMA concurrence is *not* a ground under the OCSLA for withholding approval of an otherwise approvable POE. Although the OCSLA expressly prohibits the Secretary from granting a drilling license or approving a development and production plan ("POD") without a State's CZMA concurrence, it does *not* restrain him from taking the first step—approving a POE that complies with the OCSLA—even in the face of a State's CZMA objection. See *id.* § 1340(c)(2). Indeed, during the relevant period, the DOI's own regulations made clear that, unlike an application for a drilling permit, a POE complying with the OCSLA was approvable notwithstanding a State's CZMA objection. Compare 30 C.F.R. § 250.33(i) (1993) with *id.* § 250.33(p).

b. Respondent's argument that petitioner "lack[s] any basis for asserting a claim for restitution in this case" because it failed to fulfill the purported "condition precedent" of overcoming North Carolina's CZMA objection, like the court of appeals' decision below, also ignores well-settled principles of contract law. It is hornbook law

that, where a defendant has breached, a plaintiff need not have been able to have performed his own obligations and have received the benefits of his contract in order for the contract to be rescinded and the plaintiff awarded restitution.

> A repudiation or other total breach by one party enables the other to get a judgment for damages or for restitution without performing acts that would otherwise have been conditions precedent. It is no longer necessary for the plaintiff to perform or to tender performance. This is true whether the repudiation is in express words or is by an act that makes performance by the repudiator apparently impossible or very improbable.

4 Arthur Linton Corbin, *Corbin on Contracts* § 977, at 920-22 (1951) (footnote omitted). *Accord Weintraub* v. *Rungmar Realty Corp.*, 231 N.Y.S.2d 241, 244 (N.Y. Sup. Ct. 1962) ("A contract . . . may be rescinded, and the purchase moneys paid in advance may be recovered, on the failure of the seller to perform, even though the purchaser could not have performed."). See *Restatement (Second) of Contracts* § 373 cmt. a (1981) ("Restitution is available on repudiation by the other party, even in those exceptional circumstances in which no claim for damages for total breach arises . . . ."); 12 Walter H.E. Jaeger, *Williston on Contracts* § 1454, at 2-3 (3d ed. 1978). See also *Livi Steel, Inc.* v. *Bank One, Youngstown, N.A.*, 584 N.E.2d 1267, 1269-70 (Ohio Ct. App. 1989); *Bertrand* v. *Jones*, 156 A.2d 161, 167-69 (N.J. Super. 1959). In short, where restitution (rather than an award of expectation damages) is sought, the "harmless error" rule that the court of appeals invoked and that respondent now asserts simply does not apply. Thus, if the ordinary rules of contract law apply to the United States (and they do), the court of appeals' unwarranted refusal to award restitution here, by itself, justifies certiorari.

In this case, the OBPA flatly prohibited the Secretary from performing his promise to "timely and fairly consider" the plans and applications (including the Manteo Unit's POE) petitioner submitted. The United States, having made its own performance of its contractual obligations impossible, was thus in breach. See, *e.g.*, *Winstar*, 518 U.S. at 870 (plurality opinion); *Far West Fed. Bank* v. *Office of Thrift Supervision-Director*, 119 F.3d 1358, 1364-65 (9th Cir. 1997); *Stone Forest Indus., Inc.* v. *United States*, 973 F.2d 1548, 1552 (Fed. Cir. 1992). Even if respondent were correct that petitioner had failed to satisfy the "condition precedent to [its] right to explore under the leases," Opp. 11, of overcoming a CZMA objection that was not filed until two months after the Secretary's OBPA-compelled failure to approve the Manteo Unit's POE, petitioner was nonetheless entitled to restitution (as opposed to other forms of relief which it did not seek). In short, even if respondent were correct that petitioner's duties under the leases included overcoming North Carolina's CZMA objection, neither party to the lease contracts was able to perform—the United States, by enacting the OBPA, had made its performance impossible, and North Carolina, by interposing its CZMA objection, had made petitioner's performance impossible. The result required was rescission of the leases and restitution by the government, not "the federal government's confiscation of Marathon's payment[s]." Pet. App. 20a-21a (Newman, J., dissenting) (collecting cases).

2. Respondent also contends that the enactment of the OBPA was not a "material" breach of petitioner's leases because the government's obligations under those leases never "ripened," Opp. 15. As explained above, this argument is factually incorrect. The government's obligation to "timely and fairly consider . . . exploration plans properly submitted" to it. Pet. App. 76a, did in fact "ripen" when petitioner submitted the Manteo Unit's POE.

By its own admission, the government then breached that obligation—and withheld approval of a POE which it deemed "approvable in all respects," *id.* at 194a—in order to comply with the OBPA.

Respondent's argument is also legally incorrect. The OBPA imposed an indefinite "moratorium," Pet. App. 7a, on the government's performance of *any* of its obligations under *any* of petitioner's leases. By its express terms, the OBPA completely barred the government from performing its contractual duties by prohibiting the Secretary from:

> . . .
>
> (C) approv[ing] any exploration plan;
>
> (D) approv[ing] any development and production plan;
>
> (E) approv[ing] any application for permit to drill; or
>
> (F) permit[ing] any drilling
>
> . . . .

OBPA § 6003(c)(1). This moratorium was, by the OBPA's terms, to extend from August 18, 1990, until at least October 1, 1991, and ultimately was only lifted on April 26, 1996—after the Court of Federal Claims granted petitioner's motion for partial summary judgment as to liability—when the OBPA was repealed. See Pub. L. No. 104-134, § 109, 110 Stat. 1321, 1321-177 (1996).

As the Court of Federal Claims found, the enactment of the OBPA constituted a " 'total breach' " of petitioner's OCS leases. Pet. App. 76a. It caused an "actual breach" by requiring the Secretary to withhold approval of the Manteo Unit's POE even though it "fully complie[d] with the law and w[ould] have only negligible effect on the environment," *id.* at 194a. The OBPA also constituted an *anticipatory breach* of the government's contractual

obligations as to *every other* POE, POD, or drilling permit application that petitioner might have submitted, either for the Manteo Unit or for its non-Manteo tract. See *id.* at 75a. As this Court recently reaffirmed, when the government, through post-contract legislation, makes performance of its contractual obligations impossible in *every* instance in which its performance would be required, it places itself in total breach of its contract. See *Winstar*, 518 U.S. at 870 (plurality opinion); *Stone Forest*, 973 F.2d at 1552. See also *E.H. Boly & Son, Inc.* v. *Schneider*, 525 F.2d 20, 23-24 (9th Cir. 1975). By enacting the OBPA, the government placed itself in total breach of its lease contracts with petitioner, thereby entitling petitioner to restitution of the money it had paid for its leases. See, *e.g.*, *Far West Fed. Bank*, 119 F.3d at 1365-66.

Over Judge Newman's dissent, see Pet. App. 21a, the court of appeals side-stepped this Court's holding in *Winstar* by mischaracterizing petitioner's claim as relating solely to the Secretary's refusal to act on the single POE submitted for the Manteo Unit and then dismissed that claim by erroneously finding that the OBPA was not the "real reason" for the Secretary's failure to act, see *id.* at 15a-16a. Respondent does not attempt to defend this judicial sleight of hand, but instead argues that the OBPA's categorical repudiation of the government's contractual obligations was not a "material breach" of petitioner's leases because "wholly without regard to the enactment of the OBPA, petitioners were at no time in a position to obtain the necessary approval of their proposed exploration plans." Opp. 12-13; see also *id.* at 15. The unstated premise of this argument is, of course, respondent's *speculation* that North Carolina would have raised a CZMA objection to every plan that petitioner might have proposed, whether for the Manteo Unit or its non-Manteo tract.

Even if respondent's guess as to what North Carolina would have done in response to other plans petitioner might have proposed were correct, it is *irrelevant* to whether the OBPA placed the United States in breach. By enacting the OBPA, the government made its own performance of its contractual obligation to "timely and fairly consider" plans petitioner submitted to it (and to approve plans that complied with the OCSLA within the 30-day period prescribed by the OCSLA) impossible in every instance. It was thus in breach. See *Winstar*, 518 U.S. at 870 (plurality opinion); *Far West Fed. Bank*, 119 F.3d at 1364-65; *Stone Forest*, 973 F.2d at 1552. Whether North Carolina would have raised a CZMA objection to every plan petitioner might have submitted is relevant only to the *remedies* available to petitioner as a consequence of that breach. Even if it could be reliably predicted that North Carolina would have objected to every plan petitioner might have submitted, petitioner would still be entitled to restitution (as opposed to an award of expectation damages or other relief which it did not seek). The law of restitution simply does not recognize a "harmless error" rule. See *supra* at 5. The OBPA made it impossible for the government to perform its contractual obligations and placed the government in breach. Whether petitioner could have secured North Carolina's CZMA concurrence for additional plans it might have filed and caused the obligations which the OBPA prohibited the government from performing to have "ripened" is *irrelevant* to petitioner's claim for restitution. See *e.g.*, 4 Corbin, *supra*, § 977, at 920-22. Under basic principles of fairness and contract law, petitioner was entitled to get its money back.

3. Because it argues, erroneously, that this case "does not present the broad questions of contract law posed by petitioners," Opp. 15, respondent does not address the overriding importance of those questions. The Federal

Circuit's decision in this case creates profound uncertainty as to whether, and under what circumstances, government contractors could seek rescission and restitution if federal legislation later barred the United States from performing its contractual obligations. Its decision thereby calls into question the fundamental presumption of government contracting that "[t]he United States does business on business terms." *United States* v. *National Exch. Bank*, 270 U.S. 527, 534 (1926). This Court has not in the past hesitated to grant certiorari—even in the absence of a circuit split—in order to review decisions of the Federal Circuit involving issues of recurring importance in the law governing the government's contracts with private parties. See *Winstar Corp.* v. *United States*, 64 F.3d 1531 (Fed. Cir. 1995), *cert. granted*, 516 U.S. 1087 (1996); *Hercules Inc.* v. *United States*, 24 F.3d 188 (Fed. Cir. 1994), *cert. granted*, 514 U.S. 1049 (1995). It should do so again here.

CONCLUSION

For the reasons stated above, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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